***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

# BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 22,042

514

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WILLIAM E. PORTER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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## QUESTION PRESENTED

The question presented is whether the trial court committed prejudicial error in:

(a) admitting Government Exhibit 2 into evidence without any evidentiary basis establishing the Exhibit (cardboard box, key chain and pen light) as a part of stolen goods;

(b) refusing to receive into evidence Defendant Sheffield's Exhibit No. 2, a Police Department Supplementary Evidence Report (P.D. Form 698);

(c) remarks made by the Trial Court before the jury to defense attorney Foshee after he had examined a witness at some length, "What did you bring this witness down here for, Mr. Foshee? Don't you have some examination to make of him?"

This case was not previously before this court.

## SUBJECT INDEX

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22042

WILLIAM E. PORTER,

Appellant,

Vs.

UNITED STATES OF AMERICA,

Appellee

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BRIEF FOR APPELLANT

Jurisdictional Statement

This was a prosecution of the Defendant for the crimes of Housebreaking and Grand Larceny. A trial resulted in the conviction of the Defendant for the crimes of Housebreaking and Petit Larceny. Defendant, on June 7, 1968, made application For Leave To Appeal Without Pre-Payment of Costs, which application was granted on that date by the District Court.

Statement of the Case

WILLIAM E. PORTER, along with WILLIE J. SHEFFIELD, was indicted on two counts for the crimes of Housebreaking (22 D.C. Code 1801) and Grand Larceny (22 D.C. Code 2201). They were

arrainged and tried in joinder. They were convicted of House-breaking and Petit Larceny. The testimony is summarized as follows:

The first testimony on the merits was that contained in a stipulation as to the testimony of Louis Charohas, Vice-President of Lewis Company, the establishment from which a safe and other items were removed (T. 84-85). His stipulated testimony was that on the morning of February 7, 1967, at 4:40 A.M., he was called by police concerning his store at 926 N Street, N.W. He went to the store, and identified a safe found in the alley, to the rear of his business place, which had been inside the building when the store was closed the night before. He also identified a blue nylon sample case, containing samples, that was in his store the night before. He found the front door of the store had been forced open. Mr. Charohas has no knowledge of who the parties were who entered his place of business.

Police Officer Private Walter R. Whited, Jr., was called and gave the following testimony (T. 87-118). Private Whited testified that he was assigned to the 2nd Precinct Vice Squad. On the morning of February 7, 1967, he was working in an unmarked cruiser on routine patrol with Private James L. Saltsman. At approximately 4:40 A.M. they were driving east in the 900 block of N Street, N.W. when he observed three persons in the alley to the rear of 926 N Street, N.W., standing around a large object on the ground. The cruiser was turned into the alley to investigate. It appeared the

three persons were trying to open the object. On the approach of the cruiser the three persons ran down the alley. (T. 87-89)

Private Whited testified the lighting at the scene was good.(T. 89) He was able to obtain a general description of the three suspects. The tallest of the three wore a blue waist-length jacket and dark pants and headgear. The second suspect was wearing a grayish-brownish full-length coat, light pants and headgear. The third party was wearing a light-colored full-length coat and headgear. All three suspects were Negroes.(T. 90)

The object on the ground, around which the suspects were standing, was found by Private Whited to be a metal safe mounted on wheels.(T. 91)

Private Whited and his partner called the police dispatcher for assistance which arrived shortly thereafter. He advised the newly-arrived officers of what they had found. Several of these officers then followed the tracks of the suspects in the snow.(T.93) Whited proceeded to examine the front of the store and found a door had been forced open. (T. 93) At this point Private Whited was called to proceed to 1226 Eighth Street to assist the officers who had been tracking the suspects. (T.93)

On arriving at 1226 Eighth Street they were met by Officer Slack, one of the officers who had been doing the tracking and were advised the tracks led to the rear of that address. The officers proceeded to the second floor of the building at this address/ They found a door ajar and on knocking entered and found both defendants in bed. ((T. 94) On entering the room Officer Whited testified he observed clothes that he could identify

as those he had earlier seen in the alley. (T. 94) The clothes were wet. He also observed three sets of boots that were also wet. ( T.94)

When Officer Whited first observed the defendants on entering the house they were dressed in under-shorts and T-shirts. When they dressed Sheffield was wearing a blue jacket and dark pants and Porter was wearing a brownish tweed-type full-length coat with light pants. (T. 96)

Private Whited testified that Officer Slack climbed into an attic space in the house and took out a blue suitcase or valise. The entrance to the attic was in the room where Porter and Sheffield were in bed. (T. 97) The case and contents were marked as Government's Exhibit No. 1 for identification. (T. 97) At the time Officer Slack found the case he also found Samuel Sheffield in the attic. Whited examined the case and contents and identified them as the ones Slack removed from the attic. (T. 99)

Officer Whited testified that after Porter dressed he was searched. He saw a keychain and flashlight taken from his person. (T. 100) A keychain and penlight were marked as Government's Exhibit No. 2 for identification. (T. 100) Whited identified the keychain and light as the one taken on the search of Porter. He did not indicate how he was able to identify the Exhibit. (T. 101)

The time lapse from the time Whited first observed the three suspects in the alley until he entered the bedroom where they were in bed was three to six minutes. (T. 103) He proceeded

to the house in the cruiser and did not observe the tracks leading to the house from the safe. (T. 103)

On cross-examination Officer Whited testified as follows. When he arrived at 1226 Eighth Street, other officers were present. He was among the first that entered the premises. Other officers entering were Officers Saltsman, Slack and Romano. (T. 103-a) Whited denied the door entered by the officers was broken down by them. (T. 104) Sheffield's father came to the second floor and the officers explained what they were doing there. (T. 104-105)

Whited was asked about the articles of clothing and footwear he had observed on entering the first bedroom. He confirmed his previous description of the coats. (T. 108-109) He searched each coat before defendants were allowed to put them on. (T. 108) Whited did not see any headgear when he entered 1226 Eighth Street and did not recall whether any of the three suspects wore any when they departed for the police station. (T. 114-115) Whited made the first offense report and talked with the defendants to get the information put in the report. At this point PD Form 2, Offense Report, was marked as Defendant Porter's Exhibit No. 1 for identification. (T. 139) It was identified by Officer Whited as the offense report he had prepared. (T. 142)

On re-direct Whited testified as to his first observation of the three suspects in the alley and the direction in which they ran. (T. 146-148) Also he testified that he removed the keychain and light from the pants pocket of Porter . (T 149) At this point Government Exhibits 1 and 2 for identification were offered in evidence. Counsel for Porter objected, with particular reference

to Exhibit 2. (T. 150) The objection was overruled and the Exhibits were received in evidence. (T. 151) Both Government Exhibits No. 1 and 2 were displayed to the jury.

In a session not in the presence of the jury, PD Form 380, pertaining to the arrest of Samuel Sheffield was presented to the Court. (T. 119) It showed that Samuel Sheffield had not made any statement to police officers. This had been a matter of considerable discussion between defense counsel, the Government and the Court.

The Government's next witness was Private James Lawrence Saltsman. (T. 154) On February 7, 1967, he was on duty with Officer Whited. He confirmed Whited's testimony as to observing the three persons in the alley and the fact they ran on the approach of the officers (T. 155-157), the fact they were called to 1226 Eighth Street and the subsequent events involving the arrest. (T. 158-159) Officer Saltsman stated he was the officer who removed Government Exhibit 2 from the person of defendant Porter. He described the exhibit as "a small cardboard box containing a keyholder - light combination" and identified it as the one he took from Porter. (T. 159) He stated he was able to identify the exhibit by the markings on the cardboard box which he believed were placed there by Officer Slack. (T. 160)

On cross-examination the witness generally confirmed evidence previously given. PD Form-111 was marked as Defendant Porter's Exhibit No. 2 for identification. (T. 219) Officer Saltsman identified it as a copy of a line-up sheet. (T. 219) He did not prepare this particular exhibit. Defendant Sheffield

Exhibits 3 and 4 were marked for identification. (T. 225) One exhibit was a PD Form 111, a line-up sheet on Sheffield, and the other was PD-Form 698, which is a police report of investigation.

Louis Charles Charohas was called to testify. (T. 236) He identified Exhibit 1 as a sample case and samples as being property of Lewis Company. (T. 239) As to the samples of keychains, he stated these were sold in large quantities. (T. 239) Mr. Charohas confirmed the fact of being notified by the police of the break-in and that the safe was outside the building without his permission, (T. 240), neither had he given permission for the suitcase and contents to be removed. (T. 240) In testifying as to Government Exhibit No. 2 being the same as those contained in the case, he stated they were of the same manufacture and type. (T. 242)

On cross-examination the witness stated his store did not keep an inventory record of the samples (T. 247) and he could not tell if any sample items had been removed from the sample case. (T. 248) Also he stated that salesmen for him leave samples at other places than his store. (T. 248) At the conclusion of cross-examination by Mr. Foshee, the Court stated, "What did you bring this witness down here for, Mr. Foshee? Don't you have some examination to make of him?" (T. 249-250)

Deputy Marshal Crandall C. Slack was called by the Government as a witness. (T. 251) On February 7, 1967, he was assigned to Precinct No. 2 as a private.

Marshal Slack testified that he went to the premises at 1226 Eighth Street and entered the porch and went up a stairway to the

second floor. As they were going up the stairway he heard scuffling and someone said, "The police are outside". He knocked on the door several times and the door opened or became ajar, with that he entered the room. (T. 252) Marshal Slack proceeded through the first bedroom to another such room where he saw Porter. (T. 253) He observed a trap-door to an attic space was open. He was assisted up and found Samuel Sheffield and the blue nylon sample case. (T. 235-254) Slack identified Government Exhibit 1 as the case he found. He observed the defendants as they were clothed to go to the police station and he noted their clothing was wet. (T. 255)

On cross-examination Slack testified he was the first officer to go on the porch (T. 260) and the first to go up the stairs to the second floor. (T. 262) He denied breaking in the door. (T. 263)

Defense counsel at this point moved for mistrial on the basis of the trial judge's remarks at the conclusion of Mr. Charohas' testimony. (T. 249-250) This motion was overruled on the stated grounds that too much time had been put in on the case. (T. 275)

The Government then rested its case. (T. 275)

Sammy Sheffield, the father of Willie Sheffield, was called by defendant Sheffield. (T. 281)

He testified that he saw his son Willie come home about 8:30 P.M. on February 6, 1967, and that he did not see him leave the house again until he was taken into custody by the police about 4:00 A.M. The police arrived and he was called upstairs by his son, Willie. (T. 282) The latter was arguing with the

police about whether his clothes were wet. Mr. Sheffield testified that he observed his son, Sammy Sheffield, come home the second time carrying a suit case which he took upstairs. About five minutes later the police arrived. (T. 284) He did not see anyone else come in with Sammy.

On cross-examination by counsel for defendant Porter, Mr. Sheffield stated Porter was seen by him about 2:00 or 2:30 P.M. when he asked if Willie was home. Porter then was given permission to go upstairs to see Willie. He did not see Porter again until the police arrived. (T. 285)

On cross-examination by the Government, Mr. Sheffield testified that on the night of February 6th he entertained friends at his home. (T. 285-289) Son, Sammy, was out earlier on the evening of February 6th but returned around 10:00 P.M. and borrowed a pair of boots from one of Mr. Sheffield's guests. (T. 293) He then left the house again. Sammy returned around 4:00 A.M. carrying a suit case. (T. 298) He was wearing a green jacket, boots and was bare-headed. (T. 300) Mr. Sheffield testified the police arrived about 4:00 A.M. and proceeded upstairs, not stopping at the front door, and broke in the door to the second floor. (T. 305-306) This door was boarded up on account of children. When he got upstairs Willie was showing one police officer a pair of pants and shoes which were his, neither the shoes or pants were wet. (T. 311-312)

On re-direct Mr. Sheffield testified he was 56 years of age, born in South Carolina and failed to finish the first grade in school. (T. 315-319)

Caroline Chavis, who lived with Mr. Sheffield, testified that Willie Sheffield came home at 8:30 P.M. on February 6th and she did not see him leave again. She was asleep when the police arrived. (T. 326) About 12:45 A.M. Mrs. Chavis prepared to go to bed. She was called upstairs by Willie Sheffield to make one of the other children be quiet. (T. 330-331) After that she went to bed and did not awaken until 7:30 A.M. the next morning. She was unaware that the police had been there earlier in the morning. (T. 332-333) The door to the second floor was "nailed down". (T. 335)

Samuel D. Sheffield, Jr., was called as a witness by counsel for defendant Porter, and out of the presence of the jury (T. 353) he was asked a line of questions concerning the crimes on which the defendants were indicted. He declined to answer on the grounds of possible self-incrimination.

Onita Sheffield was called by counsel for defendant Willie Sheffield. (T. 359) The witness testified she was 13 years of age (T. 360), that she awoke during the night to go to the bathroom and she saw Willie Sheffield and Porter in bed. (T. 361) Later the police arrived. (T. 362) She stated on cross-examinatio she knew who Porter was from seeing him with her brother. (T. 362)

John Sheffield was called and testified he knew Porter. (T. 364)

Defendant Willie Sheffield was called to testify in his own behalf. (T. 365) He testified that he returned home around 8:30 or 9:00 P.M. on February 6th and watched television for a time and went to bed. (T. 366) Later he was awakened by Porter

who asked to be permitted to stay the night. The next thing that he recalled was that the police arrived and made a forced entry into the bedroom. (T. 366) He testified that Officer Whited questioned him as to why his clothes were not wet and those of Porter were (T. 367) He saw his brother, Sammy, when he was taken from the attic. (T. 368)

On cross-examination Sheffield stated he had known Porter for about three or four years. He woke up when the police arrived and Porter was still asleep. (T. 369)

On re-direct examination Sheffield testified there were two other means of getting into the attic other than the trap door in his bedroom. (T. 373)

On further cross-examination Sheffield stated that he was having a second argument with one of the police officers who had entered his room and that his brother Sammy was present. The suitcase was also present (T. 377) but he denied knowing that Sammy was in the attic with the suit case.

William E. Porter was called to testify in his own behalf. (T. 383) On February 6, 1967, he was not staying at his home with his aunt as they had had an argument. (T. 384) He denied any knowledge of a housebreaking that occurred at 926 N Street, N.W., on the morning of February 7, 1967. (T. 385) During the day he had visited with various friends and gone from place to place in the snow. Around 9:00 P.M. he went to Lis Grill and stayed until about 1:30 or 2:00 P.M. (T. 386) During this period he was wearing a green overcoat, khaki pants, shoes, but no boots or a hat. (T. 386) From the Grill Porter went to Sheffield's house and was admitted by Sheffield's father. He went

upstairs and woke Willie Sheffield and got permission to stay the night and went to bed. (T. 387-385) He was awakened by the police (T. 388) and required to get dressed. (T. 389 He was searched but nothing was found. (T. 389) He denied knowing that Sammy Sheffield was in the attic. (T. 389 On arriving at the police station, Porter testified he was searched again and a box was found in his pocket. He denied having any knowledge of the box or how it came to be in his pocket. (T. 390) Porter denied having before seen the suit case found with Sammy in the attic and had never touched it. (T. 391)

On cross-examination by the Government, Porter testified at length as to how he had spent his time from early morning ofFebruary 6th until he went to Sheffield's house and went to bed. (T. 391-407)

A weather report for February 6th and 7th was offered by the defense and received as Defendant's Exhibit No. 3. (T. 417) A PD-Form 698 was offered as Defendant Sheffield's Exhibit No. 2 and was rejected by the Court. (T. 420) This report contained the results of a check for fingerprints of defendants at the scene of the crime. The report was unable to verify the presence of defendants' fingerprints at the scene of the crime.

## QUESTION PRESENTED

The question presented is whether the trial court committed prejudicial error in:

(a) admitting Government Exhibit 2 into evidence without any evidentiary basis establishing the Exhibit (cardboard box, keychain and pen light) as a part of stolen goods;

(b) refusing to receive into evidence Defendant Sheffield's Exhibit No. 2, a Police Department Supplementary Evidence Report (P.D. Form 698);

(c) remarks made by the Trial Court before the jury to defense attorney Foshee after he had examined a witness at some length, "What did you bring this witness down here for, Mr. Foshee? Don't you have some examination to make of him?"

## SUMMARY OF ARGUMENT

The Government's evidence in this case was very weak and circumstantial and errors committed had a greater significance and impact than would have been the case otherwise.

The trial Court erred in admitting into evidence Government Exhibit 2 (cardboard box containing key chain and pen light) when there was no evidence to connect it with the crime. It was identified by markings on the box. Then after the evidence was in, the Court struck the box from evidence. This left the keychain in evidence without any positive identification that it was

the one taken from appellant Porter. The jury was given no instructions covering this matter.

The Court refused to receive into evidence Defendant Sheffield's Exhibit 2. This was a police department report which showed no identifiable finger prints of defendants' at the scene of the crime. Since defendant Porter's defense was that he was not present at the scene and knew nothing of the housebreaking, exclusion of this evidence particularly prejudiced him.

Testimony of the complaining witness was stipulated initially when Government Exhibit 2 was introduced and was not covered by the stipulation as being part of complainant's property. The Court then permitted the complaining witness to be called. After some thirteen pages of testimony and after completion of examination by Mr. Foshee, the trial Court asked, "What did you bring this party down here for, Mr. Foshee? Don't you have some examination to make of him?"

The complainant testified Government Exhibit 2 was of the same manufacture and type as samples his salesmen leave over town and could be secured in other places than his place of business. The Court's remarks destroyed the value of this testimony to defendant Porter and strengthened the Government's case by implying the witness' testimony was of no import.

## ARGUMENT

The evidence presented by the Government against the defendants was at its very best weak and entirely circumstantial and in its worst light raised only a suspicion of guilt. In this context errors that were made by the trial court had a greater impact and significance than they would had the Government's case been so strong as to be an open and shut case.

The first, of several errors complained of is the admission into evidence of Government's Exhibit 2, a small cardboard box containing a key chain and pen light, taken from the person of defendant William E. Porter, after he was taken into custody. At this point in the trial there was no evidence that this was part of the stolen property involved in this case. As a matter of fact it was never clearly established that this was a part of the property taken from the complainant's place of business. At best it was only established that it was of the same manufacture and type (T. 242) as samples contained in the sample case found in the possession of the juvenile, Sammy Sheffield. Further it was established that this was a common item and that many of them had been distributed around the city. (T. 248)

On objection by defense counsel Bulman, after this Exhibit was admitted, the Court excluded the box but retained the key chain and light in evidence. (T. 345) Exclusion of the box left in evidence the unidentified chain and light as this exhibit was identified by markings on the box. When this exhibit was initially identified it was on the basis of some unidentified

markings on the box. With the exclusion of the box from evidence there was no evidence of record that this key chain was the one taken from defendant Porter. The Government made no attempt to supply such identification. If the chain was not to be separately identified as being the same one taken from defendant Porter, then it should not have remained in evidence.

Thus the principal physical evidence that had been used to connect defendant Porter with the stolen property was excluded. However, the jury had viewed this exhibit, as initially admitted, and there was no admonition or instruction to the jury on the exclusion of the box. The jury was erroneously left with evidence before it as being property taken from defendant Porter and with the further impression that it had been identified as such. This is extremely important to Porter since his sole defense is that he was not present at the scene of the crime and had no knowledge of it.

The second error that defendant Porter complains of is the exclusion of the fingerprint report of the Police Department (Sheffield's Exhibit No. 2) which had failed to verify the presence of defendants' fingerprints at the scene of the crime.

While this was evidence of a negative nature, it was important to these defendants to have it before the jury because of the circumstantial nature of the Government's case. These defendants have never been positively identified as the persons the police testified they saw in the alley at the rear of complainant's establishment. The testimony of the police officers as to identification was only in general terms as to description of clothing

and estimated heights of the three persons observed in the alley. The three parties observed in the alley were all wearing headgear but no headgear was observed with other clothing when the police entered defendants' bedroom. Nor did anyone recall whether defendants wore headgear after their arrest. If they were not the same parties, then the presence or absence of fingerprints attributed to them would be a material consideration to have before the jury. The exhibit was clearly admissible under the Federal Shop Book Rule. 28 USC 1732.

In view of the specific denial of defendants that they were not the persons the police were seeking, the absence of their fingerprints at the scene of the crime was particularly relevant. Exclusion of this evidence, favorable to defendants, from the jury's consideration in view of the very weak Government case, could only operate to the prejudice of defendants and denied them the fair trial which they were entitled to have.

The third, and probably the most serious, error that defendant Porter complains of is the remarks of the trial judge addressed to defense counsel Foshee concerning the testimony of witness Louis C. Charohas. Initially the Government and both defense counsel stipulated to the testimony of Mr. Charohas, the complaining witness. The stipulation made no reference to Government Exhibit 2 (key chain and light). As a result of it being introduced by the Government, defense counsel felt that it was necessary to call this witness to establish whether this was complainant's property and that the Exhibit was a common item that could have been obtained in many different places. Defense counsel proceeded

to examine the witness along these lines.

At the conclusion of the examination by the Government and Mr. Foshee, which examination covers thirteen pages of the transcript, the trial judge made the astonishing observation, in the presence of the jury, "What did you bring this witness down here for, Mr. Foshee? Don't you have some examination to make of him?" (R. 249, 250) This unfortunate remark, made in the presence of the jury, could only give the jury to understand that the Court attached no weight to the testimony given by the complainant concerning identification of the exhibit and availability of the key chain and light at other places than the business house of the complainant. It was important to appellant Porter that these facts be established. The trial judge's remark effectively destroyed his efforts to do so and could only leave the jury with the impression this witness' testimony was unimportant and unworthy of its attention. U.S. v. Cohe, 339 F.2d 183, 185 (1964); Witherow v. U.S.. 10 F.2d 258 (1924); cf. Shurman v. U.S., 233 F.2d 272, 278 (1956).

## C O N C L U S I O N

In view of the extremely weak and circumstantial nature of the Government's evidence, the errors of the trial court assumed greater import and significance than in the context of a strong case based upon clear and direct evidence.

Therefore it is respectfully submitted that because of the errors committed below, the judgment of the District Court should be reversed.

Respectfully submitted,

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Attorney for Appellant

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 22,042

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WILLIAM E. PORTER, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 22,084

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WILLIE J. SHEFFIELD, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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THOMAS A. FLANNERY,
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Cr. 1336-67

## INDEX



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OTHER REFERENCES



* Cases chiefly relied on are marked by an asterisk.

## ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Did the trial court err in refusing to admit in evidence a report prepared by a police fingerprint expert, who was not present to testify, showing that prints lifted from the crime scene were not the prints of either appellant?

II. Was the trial judge's comment on counsel for appellant Sheffield's cross examination of the complainant prejudicially erroneous?

III. Did the trial court err in receiving in evidence as a government exhibit, a cardboard box containing a key chain pen light, when it had been identified by two witnesses as having been taken from appellant Porter at the time of his arrest?

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* This case has not previously been before this Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 22,042

---

WILLIAM E. PORTER, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 22,084

---

WILLIE J. SHEFFIELD, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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**BRIEF FOR APPELLEE**

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## COUNTERSTATEMENT OF THE CASE

### The Proceedings

Appellants were charged in an indictment filed October 23, 1967 with one count of housebreaking and one count of grand larceny in violation of D.C. Code §§ 22-1801 and 22-2201 (1967) respectively.[1] The charges arose from a break-in and theft on February 7, 1967. After trial by a jury on March 13-20, 1968, the Honorable Leonard P. Walsh presiding, a verdict was returned finding appellants guilty on count one of housebreaking and on count two of the lesser included offense of petit larceny. On March 25, 1968 appellants filed a motion for judgment of acquittal notwithstanding the verdict, or alternatively for a new trial. The motion was heard and denied on May 10, 1968. On June 7, 1968 appellant Porter was sentenced to two to six years on count one and one year on count two, to run concurrently with count one. The sentence as to both counts was split, appellant to serve six months imprisonment with the balance suspended and to be placed on probation for five years. On the same day appellant Sheffield was sentenced under the Youth Corrections Act, 18 U.S.C. § 5010(b) (1964). These appeals followed and were ordered consolidated by the Court, *sua sponte*, on July 3, 1968.

### The Government Evidence

The government's case consisted of the testimony of Louis C. Charohas, an officer of the corporation which owned the building broken into and the property stolen, as

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[1] Appellants were originally indicted under Criminal No. 427-67 (Grand Jury No. 320-67). That indictment was dismissed as to appellant Sheffield on June 22, 1967 for lack of jurisdiction, Sheffield having been a juvenile at the time of the offense. The Juvenile Court, the Honorable John D. Fauntleroy, waived jurisdiction over appellant Sheffield by order filed August 7, 1967 and *both* appellants were reindicted under Criminal No. 1336-67 (Grand Jury No. 1467-67). On February 8, 1968 the original indictment was dismissed as to appellant Porter.

well as the testimony of several police officers. The parties stipulated that Mr. Charohas would testify that he was a vice president of the Lewis Company, a corporation; that he had been called by the police to his store at 926 N Street, N.W., in the District of Columbia at 4:40 a.m. on February 7, 1967; that in the alley behind his place of business he had found a safe which was owned by the company and which had been in the store the night before when it was closed. He would also have testified that government exhibit 1, a blue nylon suitcase containing advertising samples, belonged to the company and had been in the store the night before. He found the front door at 926 N Street, N.W. had been forced open, though it had been locked the night before. He had no knowledge of who had taken the safe and other articles referred to, the total value of which exceeded one hundred dollars. (Tr. 84-85.)

Officer Walter R. Whited testified that he was riding east in a scout car in the 900 block of N Street, N.W. at 4:40 a.m. on February 7, 1967. (Tr. 87-88.) He saw three people in an alley which ran north and south alongside 926 N Street, N.W.; they were standing around a large object on the ground and it appeared they had a large bar with which they were trying to open the object. As he and his partner started into the alley, all three men ran. (Tr. 89.) The lighting was good and he described the three as follows: 1. Negro male 5′8″, wearing a blue short jacket, dark pants and head gear. 2. Negro male 5′7″ wearing a gray or brown full length coat, light pants and head gear. 3. Negro male wearing a full length coat and head gear. (Tr. 90.) He discovered upon closer inspection that the object was a safe, (Tr. 91.) and called for assistance. It was snowing and the ground was covered with snow and there were tracks around and leading away from the safe. He found the front door glass of 926 N Street, N.W. off its hinges. The building belonged to the Lewis Company. (Tr. 93.) During this time asstance had arrived and other officers had followed the tracks in the snow. Those tracks lead only to 1226 8th

Street, N.W., and the other officers who had arrived there called Whited and his partner for assistance at that location. (Tr. 93-94.)

Various officers including Whited and his partner entered the premises at the 8th Street address and went to the second floor, from which some of the officers heard noises emanating. (Tr. 94.) The two appellants were there in bed and officer Whited noted that he could identify wet clothing lying on a couch as being the same clothing he had seen in the alley near the safe. There were also three pairs of wet boots on the floor. (Tr. 94.) When appellants got dressed Sheffield put on a blue jacket and dark pants and Porter put on a brownish tweed full length coat with light khaki pants; both sets of apparel were "like" those worn by persons in the alley. (Tr. 96.) At that time they noticed a trap door in the ceiling hanging open. Officer Slack was boosted up through it and subsequently found both Sammy Sheffield, a juvenile, and a blue suitcase, lying between the rafters. Officer Whited examined government exhibit 1, and indicated that it was the same suitcase and contents brought down from the attic by officer Slack. (Tr. 97-99.) Appellant Porter was searched in Officer Whited's presence and a small key holder with a pen light attached was taken from his person. Whited identified government exhibit 2 as the key holder pen light taken from appellant Porter. (Tr. 100-01.) A total of three to six minutes had elapsed between the sighting of the three men in the alley and arrest of appellants and Sammy Sheffield. (Tr. 103.)

Extensive cross examination was devoted to whether Sammy Sheffield had made a statement to police exculpating appellants.[2] Officer Whited testified that there had

[2] Considerable time was spent out of the jury's presence regarding Sammy Sheffield's participation in the events constituting and following the offense. (Tr. 3-10, 29-31, 41-82, 118-24, 144-46, 164-92, 347-59.) In addition to whether he had made a statement to police, questions were raised whether he would testify as a defense witness and if not, whether he might be called as a defense witness and allowed to claim the fifth amendment in the presence of the jury. The evidence was uniformly that he had made no statement

been three coats in the room where appellants were arrested, a beige trench coat in addition to those that appellants put on. (Tr. 108.) He reiterated that appellant Sheffield had put on a blue waist length coat. (Tr. 114.)

Officer James Lawrence Saltsman testified and in substance corroborated the testimony of Officer Whited. In addition to giving a similar version of the sighting of and flight by the three men in the alley (Tr. 154) he indicated that all of the officers had gone into the house at 1226 8th Street, N.W. together. (Tr. 168.) When he first saw appellant Sheffield, appellant was standing in the middle of the second room on the second floor; he was agitated in the extreme about the officers' presence. Appellant Porter was then in the front bedroom in bed. (Tr. 158.) After Porter dressed, he was searched and a key holder light in a small cardboard box was recovered from his pocket. Government exhibit 2 was that key holder. (Tr. 159-60.) A noise was heard over the first bedroom and Officer Slack went up through the trap door to investigate. Slack returned with a blue nylon suitcase and Sammy Sheffield. (Tr. 160.) Officer Saltsman observed that clothing lying partially in a closet, as well as the floor was wet. He saw two pairs of boots. (Tr. 161-62.) When appellants dressed, Porter wore a brown checked overcoat and one of the Sheffields wore a trench coat, though he could not recall which one. (Tr. 162.)

On cross examination[3] by counsel for appellant Porter he indicated that one of the three fleeing men had worn a gray or brown overcoat. (Tr. 201.) Three to five minutes elapsed between the original alley sighting and flight and appellants' arrest at the 8th Street address. (Tr. 205.) When the officers arrived there they heard talking upstairs, while on the porch. (Tr. 207.) He re-

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to police and he declined to testify on fifth amendment grounds. It is not clear whether the judge ruled on the procedural question because counsel subsequently decided not to call Sammy Sheffield as a witness before the jury. (Tr. 347-59.)

[3] It is designated in the record, apparently erroneously, as "Direct Examination." (Tr. 195.)

iterated that he had found the key holder in appellant Porter's pocket after Porter had dressed, but before Officer Slack returned from the attic with Sammy Sheffield. (Tr. 218.) He had no knowledge of any fingerprints. (Tr. 220.)

On cross examination by counsel for appellant Sheffield he stated that the 8th Street house was about a block away from the Lewis Company building and that it had taken about a minute to travel there. (Tr. 224.) While he repeated that he had no knowledge of any fingerprints, he elaborated: "We notify identification as a matter of procedure and they responded. What they lifted, if anything, I do not know." (Tr. 225.) He identified a Police Department form 698 shown him by defense counsel as a report prepared by the identification bureau and containing the results of their investigation. (Tr. 226.)

On redirect examination officer Saltsman indicated that the clothes appellant Porter had put on were all wet, as were his boots. (Tr. 228.) He did not recall seeing where appellant Sheffield got the clothes he put on.

Louis C. Charohas was called to testify and he identified government exhibit 1 as a suitcase belonging to the Lewis Company which was used to carry advertising samples. He also identified the contents of the exhibit as being samples belonging to the company. (Tr. 238-39.) He identified government exhibit 2 as being one of the firm's samples, a key holder and pen light. On comparison of the exhibit with the samples contained in exhibit 1, he stated that they were of the same type and made by the same manufacturer. (Tr. 239-41.) He had had quite a few of them in his store the night before the break-in. On cross examination he acknowledged that the items (key chains) were distributed by his salesmen to various places in the city and that he had no record as to how many of them had been in his store on the night in question. (Tr. 247-48.)

Officer Slack testified that he first saw appellant Sheffield standing in the first room of the second floor at the 8th Street location and that Sheffield had been agitated.

(Tr. 251.) He said that he had been assisted by other officers in getting into the attic; that he had found Sammy Sheffield lying between the rafters; and that the blue nylon suitcase had been lying next to Sammy Sheffield. (Tr. 253-54.) He identified government exhibit 1 as the bag and contents which he had found in the attic. (Tr. 254.) He looked while he was in the attic and found no other entrance beside the trap door through which he had entered. When appellants got dressed he noticed that their clothing was wet. (Tr. 255.) He recalled that Officer Saltsman had found a key case on appellant Porter. (Tr. 255.)

**The Defense Evidence**

The defense case consisted of the testimony of Sammy Sheffield, Sr., Caroline Chavis, Onita Sheffield and both appellants. Mr. Sheffield, Sr. testified that he was the father of appellant Sheffield and Sammy Sheffield; that on the night in question his son Willie had come home at 8:30 p.m. and that he had not seen him leave before the police arrested him; and that his son Sammy had come in running and carrying a suitcase five minutes before the police arrived. (Tr. 281-84.) Sammy had come home about 10:00 p.m., borrowed some boots, and left. (Tr. 292-293.) Appellant Porter had come to the house about 2:00 a.m. to see Willie. He went upstairs and Mr. Sheffield did not see him again until the police came. (Tr. 285.)

Caroline Chavis testified that she was Sammy Sheffield Sr.'s girlfriend; that she had seen Willie come in the house at about 8:30 p.m. on February 6, and that she had not seen him leave before she retired for the night at about 12:45 a.m. (Tr. 326.) Willie called her at 1:00 a.m. to come quiet a child. (Tr. 332.) Onita Sheffield testified that she was appellant Sheffield's sister. She testified she had awakened in the night and had seen appellants in bed. She did not specify the time but it was before the police came. (Tr. 359-61.)

Appellant Sheffield testified that he had been at Liz' Grill on 9th Street until about 8:30 p.m. on February 6. He then went home, watched TV and went to bed. (Tr. 366.) He was awakened by appellant Porter who asked if he could stay with him that night because it was cold and snowing. He said it would be all right, Porter got undressed and into bed and both went to sleep. The next thing he knew, the police were there. (Tr. 366.)

On cross examination he said he did not see his brother Sammy go into the attic, but did see Officer Slack bring him out. (Tr. 372.) He testified that there was another way to get into the attic by climbing up the outside from the bathroom window, but acknowledged that he had not heard anything prior to the arrival of the police. (Tr. 373-78.) When he got dressed he put on blue slacks and a white trench coat. (Tr. 379.)

Appellant Porter testified that he had hung around Liz' Grill at 9th and O Streets until about 1:00 or 2:00 a.m. and then had gone to the Sheffield's and asked to stay. (Tr. 386-87.) He was admitted by Mr. Sheffield who said he could go upstairs to see Willie. (Tr. 387.) He was wearing a green overcoat with khaki pants. (Tr. 386.) When the police arrived he put on the same clothes that he had come in which were wet because it had been snowing. He had not stayed at the Sheffield's before. He acknowledged that a key chain pen light was found in his pocket, but said he did not know how it had gotten there. Further he said that the search had not been conducted at the house, but rather later, at the precinct headquarters. (Tr. 410.)

## ARGUMENT

**I. The trial court did not err in refusing to admit in evidence as a defense exhibit, a document prepared by a police fingerprint expert who was not present to testify, showing that prints lifted from the crime scene were not the prints of either appellant.**

(Tr. 98, 219, 225-26, 284, 343, 420; March 19-20 Tr. 19-20, 22.)

Counsel for appellant Sheffield at trial sought to introduce in evidence a police report form 698 which had been completed by Officer Eddy B. Sims of the identification section, after he had responded to the Lewis Company building and dusted for prints. It said:

> The latent fingerprints lifted from a lamp which was removed from a desk top adjacent to the safe by the undersigned were compared with the known fingerprint specimens taken from Willie Earl Porter, ID #212898, Samuel Lee Sheffield, ID #212896, and Willie James Sheffield, ID #204554. After conducting this examination, it was determined by the undersigned that none of the fingerprints of the above were identical with the latents.

Counsel for both appellants had received copies of the report pursuant to a subpoena issued by the court at their request. (Tr. 219.) The report was marked as defendant Sheffield's exhibit 2 for identification.[4] When counsel moved to introduce the exhibit in evidence at the close of the trial, the court denied the motion because the officer present in court had not lifted the prints or made the comparison analysis and was not qualified to testify as an expert. (Tr. 420.) Appellants contend that they were unfairly prejudiced by the court's denial. We disagree.

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[4] At one point in the trial, counsel for appellant Sheffield asked Officer Saltsman to look at "defendant's exhibit 3 and 4." The officer identified one of them as a police fingerprint report form. (Tr. 226.) The number designations were subsequently changed (Tr. 343.) and the print report offered in evidence was designated as defendant Sheffield's exhibit 2. (Tr. 420.)

The Federal Business Records Act, 28 U.S.C. § 1732(a) (1964) provides, *inter alia*:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

The statute's purpose is to eliminate the necessity of taking testimony from each person who may have prepared a part of sometimes voluminous records. Its basis is the trustworthiness inherent in routinely made notations recording observations, acts and occurrences. Since the requirements of day to day operation call for accurate recording of such matters, a motive to falsify is ordinarily absent. *Palmer* v. *Hoffman*, 318 U.S. 109, 112-14 (1943). But where preparation of the document sought to be admitted cannot fairly be said to be within the "ordinary course" of business of the party preparing it, the inherent trustworthiness fundamental to the statute's rationale sometimes disappears. Thus the Supreme Court held in *Palmer*, *supra*, that the statement of a railroad engineer, prepared for use in litigation, rather than in the ordinary course of the railroad's business as a railroad, was inadmissible.

The Act has also been interpreted by this Court as not encompassing the introduction of documents containing opinions or conclusions of a person not called to testify. Hence hospital records containing a psychiatrist's diagnosis of a patient's mental condition were held inadmissible when the psychiatrist did not testify. The Court said: "records [in order to be admissible] must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the

record is an automatic reflection of observations. This obviously excludes those which depend on opinion or conjecture." *New York Life Ins. Co.* v. *Taylor*, 79 U.S. App. D.C. 66, 72, 147 F.2d 297, 303 (1944). It was because different psychiatrists might have reached different conclusions regarding the same patient that the Court affirmed the exclusion of the hospital records in the case. Admission would have denied the opposing party an opportunity to cross examine the person whose opinions the records contained.

This Court has since uniformly held that documents containing expert medical opinions are inadmissible under the Act. *Whittaker* v. *United States*, 108 U.S. App. D.C. 268, 269, 281 F.2d 631, 632 (1960); *Polisnik* v. *United States*, 104 U.S. App. D.C. 136, 137, 259 F.2d 951, 952 (1958); *Lyles* v. *United States*, 103 U.S. App. D.C. 23, 29, 254 F.2d 725, 731 (*en banc* 1957), *cert. denied*, 356 U.S. 961 (1958); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692, 704-05 (8th Cir. 1967); *c.f. Logan* v. *United States*, 109 U.S. App. D.C. 104, 284 F.2d 238 (1960); *Otney* v. *United States*, 340 F.2d 696, 700-02 (10th Cir. 1965); *Standard Oil Co. of Calif.* v. *Moore*, 251 F.2d 188, 213-16 (9th Cir. 1957); *See Gass* v. *United States*, D.C. Cir. No. 21,198 decided January 29, 1969, slip op. at 7, n. 17; *United States* v. *Rothman*, 179 Fed. Supp. 935, 938 (D. Pa. 1959.).

It is well settled that fingerprints are properly the subject of expert testimony. *United States* v. *Kelly*, 55 F.2d 67, 69 (2d Cir. 1932); *c.f. Stopelli* v. *United States*, 183 F.2d 391 (9th Cir.) *cert. denied*, 340 U.S. 864 (1950). Accordingly appellee contends that the trial judge did not err in excluding the report containing results of a fingerprint comparison when the expert who made the print analysis was not present to testify as a witness regarding his conclusions.

Despite the trial judge's announced ground for the exclusionary ruling—that the officer present in court was not an expert and could not testify about the print analysis—neither counsel for appellants sought to subpoena of-

ficer Sims who was an expert and had made the analysis and could have testified. Rather, they sought to introduce the report in a fashion which would have created an illusion of unblemished support for appellants' story. It is an illusion to which we think appellants were not entitled.

Had the court permitted introduction of the report, a substantial possibility of prejudice to the government would have resulted. As it stood the report contained a negative assertion: that latent prints had been lifted and that they matched neither appellants' nor Sammy Sheffields'. Appellants presented an alibi defense and if the report had been admitted in that form it would have unfairly aided their case. The jury could reasonably have believed that if prints had been found which did not match either of the appellants', someone else was the culprit. Yet had the expert witness been there to testify, he could have answered whether the prints lifted had been compared with those of people who *legitimately* occupied the building; how long the prints had been there before they were lifted; the likely accessibility of the place the prints were found to intruders; and whether other partial prints were found. Introduction of the report without opportunity to cross examine the print expert as to these points would have given the jury a grossly distorted picture of its evidentiary value. Fingerprint experts' conclusions might not differ as frequently as the Court in *Taylor*, *supra*, found psychiatrists' diagnoses would. But here appellants sought to use the report to corroborate their alibi with a broad conclusion: that if prints had been found which were not theirs, then someone else, and not they, had committed the crime. It was the need to probe the expert as to *what conclusions might reasonably be drawn* from the report that made cross examination vital to the government. Otherwise appellants' broad conclusion could not have been effectively challenged.

Little, if any, prejudice inured to appellants by reason of the report's exclusion. The defense theory, implicity, was that Sammy Sheffield, the juvenile, had participated in the break-in, but that neither appellant had. (March

19-20 Tr. 22.) Sammy Sheffield Sr. testified that he saw his son Sammy run into the house with a blue suitcase just prior to the arrival of the officers. (Tr. 284.) Sammy was found with the blue Lewis Company suitcase moments later in the attic of an upstairs room in which at least one of appellants was found. (Tr. 98.) The fingerprint report, however, explicitly stated that the lifted prints were compared with Sammy's as well as appellants'—all with negative results.

Even though the report was not admitted in evidence, counsel did elicit testimony before the jury that the identification section of the police department had responded to the scene and had prepared a report detailing the results. (Tr. 225-26.) Additionally counsel for appellant Porter vigorously argued to the jury that while fingerprints had been taken, (*i.e.*, sought) none had been introduced; that no fingerprints of either defendant had been found. (March 19-20 Tr. 34.)

We think that the exhibit's relatively small probative value coupled with the potential for prejudice to the government which would have resulted from its admission, in these circumstances outweighed the almost negligible prejudicial effect on appellants' case.

**II. The trial judge's comment respecting counsel for appellant Sheffield's cross examination of the complainant was not prejudicial error.**

(Tr. 90-114, 159-60, 218, 236-50, 255, 275; March 19-20 Tr. 22.)

At the outset of the trial all parties stipulated to the testimony of Mr. Louis C. Charohas, a vice president of the Lewis Company, owner of the building which had been the subject of the housebreaking involved. During the course of the government's case, evidence was introduced that a key chain pen light had been found in the pants pocket of appellant Porter when he was arrested at the Sheffield house; and that the key chain looked to be the same as several contained in the blue suitcase which Sammy Sheffield had had next to him when found in the attic.

(Tr. 100, 159-60, 218.) As the stipulation had not included any reference to the key chain, counsel for appellants desired to get Mr. Charohas' testimony on the subject. Government counsel called Mr. Charohas and examined him about the key chain and whether it had come from his store. (Tr. 236-45.) Counsel for appellant Sheffield (the key chain was found on Porter) cross examined Charohas respecting the number of similar key chains in the community, whether Charohas' key chains might be distributed in various places and thus found elsewhere than in his store, and the like. (Tr. 245-49.) Following this the trial judge said, in the presence of the jury: "What did you bring this witness down here for Mr. Foshee? Don't you have some examination to make of him?" (Tr. 249-50.) Shortly thereafter both counsel for appellants moved for a mistrial on the ground that the court's remark had been prejudicial. The court denied the motion, stating that too much time had then been spent on the case. (Tr. 275.) Appellants contend that the comment unfairly prejudiced their cases because it indicated the judge discredited counsel's cross examination. Especially so, they say, because the key chain found in appellant Porter's pocket was the only evidence linking appellant Sheffield (with whom Porter was arrested) to the crime.

The law is clear that a trial judge conducting a jury trial is not required to sit as a mute and lifeless moderator. *Maguire* v. *United States*, 358 F.2d 442 (10th Cir. 1966); *Daley* v. *United States*, 231 F.2d 123 (1st Cir.), *cert. denied*, 351 U.S. 964 (1956). While a judge must act with restraint and within reasonable bounds, *Wheeler* v. *United States*, 219 F.2d 773 (7th Cir.), *cert. denied*, 349 U.S. 944 (1955), remarks produced by a natural impatience and voiced in the heat of a spirited trial will not be ground for reversal unless clearly prejudicial to a defendant's case before the jury. *Kohatsu* v. *United States*, 351 F.2d 898 (9th Cir.), *cert. denied*, 384 U.S. 1011 (1965); *Carroll* v. *United States*, 326 F.2d 72 (9th Cir. 1963); *Woodring* v. *United States*, 311 F.2d 417 (8th Cir.), *cert. de-*

*nied*, 373 U.S. 913 (1963); *Pacman* v. *United States*, 144 F.2d 562 (9th Cir.), *cert. denied*, 323 U.S. 786 (1944). And where a court's comments reflect more on the way a case is tried than on the case itself an appellate court will generally not reverse a conviction. *United States* v. *Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

It is apparent that the judge felt additional testimony from Mr. Charohas was cumulative as to both sides and of little evidentiary value. He had possibly become concerned about the lack of reasonably efficient use of court resources during the trial. At that point almost forty percent of the time expended had been devoted to probing whether the juvenile Sammy Sheffield had made a statement to police officers exculpating appellants, a search which appellant Sheffield seems to concede was a wasted effort.[5] Against this backdrop the remark was understandable, though perhaps unfortunate.

The key case found in Porter's pants pocket was not, contrary to appellant Sheffield's assertion, the only evidence linking Sheffield to the crime. The testimony was that the tracks of the three fleeing figures originally seen around the Lewis Company safe in the alley led only to 1226 8th Street, N.W., where both appellants and Sammy Sheffield were found only minutes later.[6] (Tr. 94-103.) Sammy Sheffield was uncovered with the blue Lewis Company suitcase in an attic over the room in which appellant Sheffield was found. (Tr. 97-99.) Also contrary to his assertion, there was testimony that three pairs of boots were found in the room and that all the clothing (including Sheffield's) was wet. (Tr. 255.) Officer Whited testified that appellant Sheffield put on a blue waist length

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[5] See note 2, *supra*; Brief for appellant Sheffield at 7, n.1. Approximately 98 pages of transcript were required to report the various inquiries conducted, out of a total for the trial at that time of 250 pages. If nothing else this characterizes the fundamental fairness with which the court approached the case.

[6] While tracking testimony was hearsay, no objection to its admission was made, no motion to strike was made at any subsequent time and no contrary evidence was introduced.

coat and dark pants, similar to the clothes he described one of the three fleeing burglars as wearing. (Tr. 90, 96, 114.) Thus there was substantial other evidence linking appellant Sheffield with the scene and the crime.[7]

Considering the other evidence linking appellant Sheffield to the crime together with the court's detailed instructions to the jury as to their exclusive function to decide the facts in the case, we think that any possibility of prejudice was successfully dissipated.

**III. The trial court did not err in receiving in evidence as government exhibit 2, a cardboard box containing a key chain pen light, when it was identified by markings on the box as having been taken from appellant Porter during a search following his arrest.**

(Tr. 101, 159-160, 242, 255, 343, 345)

Officers Whited and Saltsman both identified government exhibit 2 as being a key case pen light taken from the pocket of appellant Porter when he was arrested. On direct examination Whited simply testified that he recognized the exhibit as having been taken from Porter. (Tr. 101.) Saltsman did the same and specified that he recognized it by the makings on the cardboard box in which it had been and was at trial contained. (Tr. 159-160.) Officer Slack testified that he saw a key case being taken from Porter during a search. (Tr. 255.) On cross examination by both trial counsel for appellants, no questions were asked about the basis of each conclusion that the exhibit was the same key case that had been taken from Porter. After the exhibit had been introduced in evidence, counsel for appellant Porter moved to strike it because there had been no identification of it as belong-

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[7] We think this disposes of appellant Sheffield's contention that the evidence does not support his conviction. The evidence set out surely provides the basis for a conclusion beyond a reasonable doubt that he was one of the three men who fled from the stolen safe outside the Lewis Company; and his trial counsel conceded in argument to the jury that there was no question but that the three men who fled from the safe had committed the crime. (March 19-20 Tr. 22.)

ing to the Lewis Company and apparently because it had not been identified as the item taken from Porter. (Tr. 343-345.) Counsel also objected to the jury's seeing the markings on the box which Saltsman recognized, because the officer had said he had not made the markings himself. Government counsel suggested that the box be eliminated and that was done. (Tr. 345.) No further objection was voiced by counsel. Appellant Porter now somehow contends that the evidence was erroneously admitted.

Custody and control of fungible physical evidence seized from and used against a defendant generally must be shown in order for it properly to be admitted in evidence at trial. *Gass* v. *United States*, D.C. Cir. No. 21,198 decided January 29, 1969, slip op. at 4, n. 8; *Pinkney* v. *United States*, 124 U.S. App. D.C. 209, 363 F.2d 696 (1966); *Headen* v. *United States*, 115 U.S. App. D.C. 81, 317 F.2d 145 (1963); *Peden* v. *United States*, 96 U.S. App. D.C. 27, 223 F.2d 319, *cert. denied*, 359 U.S. 971 (1955); *Novak* v. *District of Columbia*, 82 U.S. App. D.C. 95, 161 F.2d 588 (1947). The less fungible an item is, however, the more reasonable it becomes to allow its admission. Evidence as to the certainty of identification goes to its weight rather than its admissibility. Thus the Court held in *Pinkney*, *supra*, 124 U.S. App. D.C. at 211, 363 F.2d at 698, that it was proper to admit a knife which a witness identified as being "similar" to one used in an attack.

Custody and control of the key chain here were at least implicitly shown. Officer Saltsman testified that he recognized the exhibit by markings put on the box by another officer, as well as by the item's general appearance. Officer Whited testified that he recognized it as the key chain taken from appellant Porter. We think this makes out at least a prima facie showing that the exhibit was the same key chain combination removed from Porter's pocket. Indeed, that is almost precisely what both officers said. (Tr. 101, 159-60.) If appellants seek to challenge the chain of custody in these circumstances surely they must

lay a foundation by cross examining the witnesses as to their conclusions.

With respect to the "lack" of identification of the key case as being the stolen property of the Lewis Company, we think the point is frivolous. Mr. Charohas testified that the exhibit looked to him to be one of his; it was the same "manufacturer, the same type." (Tr. 242.) Where an appellant was found in possession of cigarettes and change similar to property taken from a burglarized shoe shop and he contended that the items should have been specifically identified as those taken from the shop, this Court said: "We know of no case requiring actual identification of such fungible goods, and it is apparent that any such requirement would be unworkable." *Russell* v. *United States*, D.C. Cir. No. 21,571 decided January 24, 1969, slip op. at 2, n. 4.

## CONCLUSION

WHEREFORE, appellee submits that the judgment of the District Court should be affirmed.

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